

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

**RECEIVED**

**Jun 18 2021**

APPEAL FROM FLORENCE COUNTY  
Timothy H. Pogue, Family Court Judge

---

**SC Court of Appeals**

Appellate Case No.: 2021-000030

---

Kathleen S. Carter.....Respondent,

v.

Joseph R. Carter.....Appellant.

---

FINAL BRIEF OF APPELLANT

---

Rebecca West  
HARLING & WEST, LLC  
Attorney for Appellant  
South Carolina Bar # 68405  
203 West Main Street, Suite B  
Post Office Box 2485  
Lexington, South Carolina 29071  
(t) (803) 957-0889

TABLE OF CONTENTS

Table of Authorities.....iii

Statement of the Case.....1

Statement of Facts.....2  
    Standard of Review.....4

Argument.....5

I. The family court lacked jurisdiction to divide husband’s nonmarital retirement accounts.....5

    a. Wife is not entitled to special equity in husband’s nonmarital Stifel Accounts.....13

II. The dates on which the family court valued certain assets and debt were incorrect.....14

    a. The family court erred in valuing the mortgage debt as of the date of trial.....14

    b. The family court erred in valuing the marital investment account on the date of filing.....22

    c. The family court erred in valuing the IHG credit card on the date of trial.....24

III. The values assigned to Wife’s vehicle and jewelry are not supported by the greater weight of the evidence.....28

    a. The 2013 Toyota Landcruiser should be valued at \$6,800.00.....28

    b. Wife’s jewelry should be valued at \$20,000.....29

IV. The amount of alimony awarded to Wife was excessive.....30

    a. The evidence does not support imputing annual income of \$80,000 to Husband.....31

        i. There was no evidence that Husband under-reported his income or exaggerated his expenses for the purpose of depriving Wife of support.....32

        ii. The court imputed income to Husband despite there being no evidence that he was underemployed.....37

    b. Husband does not have the ability to pay alimony of \$2,700.00 per month.....39

    c. Wife does not need alimony of \$2,700.00 per month.....42

    d. The parties’ standard of living during the marriage was not “upper middle class.”...45

V. The court erred in awarding fees to Wife.....46  
Conclusion.....48  
Equitable Division Addendum.....50

TABLE OF AUTHORITIES

CASES

*Allen v. Allen*, 347 S.C. 177, 554 S.E.2d 421 (Ct.App.2001)..... 39

*Barrow v. Barrow*, 394 S.C. 603, 716 S.E.2d 302 (Ct.App.2011)..... 18, 19

*Bodkin v. Bodkin*, 388 S.C. 203, 694 S.E.2d 230 (Ct. App.2010)..... 20

*Bowen v. Bowen*, 327 S.C. 561, 490 S.E.2d 271 (Ct.App.1997)..... 5

*Burch v. Burch*, 395 S.C. 318, 717 S.E.2d 757 (2011)..... 14-19, 22

*Burgess v. Burgess*, 467 S.C. 98, 753 S.E.2d 566 (Ct.App.2014)..... 37

*Cannon v. Cannon*, 321 S.C. 44, 467 S.E.2d 132 (Ct.App.1996)..... 46

*Chanko v. Chanko*, 327 S.C. 636, 490 S.E.2d 630 (Ct.App.1997)..... 10, 11

*Couch v. Couch*, 431 S.C. 170, 847 S.E.2d 260 (Ct.App.2020)..... 46, 47

*Craig v. Craig*, 358 S.C. 548, 595 S.E.2d 837 (Ct.App.2014)..... 28

*Crossland v. Crossland*, 408 S.C. 443, 759 S.E.2d 419 (2014)..... 32

*E.D.M. v. T.A.M.*, 307 S.C. 471, 415 S.E.2d 812 (1992)..... 46

*Ferguson v. Ferguson*, 300 S.C. 1, 386 S.E.2d 267 (1989)..... 5, 28

*Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991)..... 46, 47

*Grumbos v. Grumbos*, 393 S.C. 33, 710 S.E.2d 76 (Ct.App.2011)..... 32, 33

*Johnson v. Johnson*, 296 S.C. 289, 372 S.E.2d 107 (Ct. App. 1988)..... 5, 20

*Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011)..... 4

*Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996)..... 40

*McDavid v. McDavid*, 333 S.C. 490, 511 S.E.2d 365 (1999)..... 16-18

*McElveen v. McElveen*, 332 S.C. 583, 506 S.E.2d 1 (Ct.App.1998)..... 41

*McMillan v. McMillan*, 417 S.C. 583, 790 S.E.2d 216 (Ct. App. 2016)..... 5, 11

<i>Moore v. Moore</i> , 414 S.C. 490, 779 S.E.2d 533 (2015).....	14, 16
<i>Nelson v. Nelson</i> , 428 S.C. 15, 833 S.E.2d 432 (Ct.App.2019).....	28
<i>Prevatte v. Asbury Arms</i> , 302 S.C. 413, 396 S.E.2d 642 (Ct.App.1990).....	47
<i>Pruitt v. Pruitt</i> , 389 S.C. 250, 697 S.E.2d 702 (Ct.App.2010).....	24
<i>Rimer v. Rimer</i> , 361 S.C. 521, 605 S.E.2d 572 (Ct.App.2004).....	31, 41
<i>Roof v. Steele</i> , 413 S.C. 543, 776 S.E.2d 392 (Ct.App.2015).....	40
<i>Sanderson v. Sanderson</i> , 391 S.C. 249, 705 S.E.2d 65 (Ct.App.2010).....	32, 38
<i>Sexton v. Sexton</i> , 310 S.C. 501, 427 S.E.2d 665 (1993).....	46
<i>Stoney v. Stoney</i> , 422 S.C. 593, 813 S.E.2d 486 (2018).....	4
<i>Stoney v. Stoney</i> , 425 S.C. 47, 819 S.E.2d 201 (Ct.App.2018).....	32, 33
<i>Sweeney v. Sweeney</i> , 426 S.C. 229, 826 S.E.2d 299 (2019).....	40
<i>Taylor-Cracraft v. Cracraft</i> , 417 S.C. 570, 790 S.E.2d 423 (Ct.App.2016)...	8
<i>Teeter v. Teeter</i> , 408 S.C. 485, 759 S.E.2d 144 (Ct.App.2014).....	14, 16
<i>Tomlinson v. Melton</i> , 428 S.C. 607, 837 S.E.2d 230 (Ct. App. 2019).....	4
<i>Way v. Way</i> , 398 S.C. 1, 726 S.E.2d 215 (Ct.App.2012).....	39, 40
<i>Webber v. Webber</i> , 285 S.C. 425, 330 S.E.2d 79 (Ct. App. 1985).....	13
<i>Wilburn v. Wilburn</i> , 403 S.C. 372, 743 S.E.2d 734 (2013).....	6, 9, 11, 17
<i>Wooten v. Wooten</i> , 364 S.C. 532, 615 S.E.2d 98 (2005).....	24, 25

#### STATUTES

S.C. Code Ann. §20-3-130 (2014).....	5, 31
S.C. Code Ann. §20-3-620 (2014).....	20
S.C. Code Ann. §20-3-630 (2014).....	5, 13, 18
S.C. Code Ann. Regs. 114-4720 (2012).....	32, 38

## STATEMENT OF THE CASE

Appellant (“Husband”) appeals the family court’s Final Divorce Decree dividing the marital estate, awarding \$2,700.00 per month in alimony to Respondent (“Wife”) and requiring him to pay Wife’s attorney fees. Husband also appeals the family court’s order denying his motion for reconsideration.

Wife filed an action for separate maintenance and support on April 12, 2018, seeking alimony, equitable apportionment of the marital estate, an order prohibiting the parties from selling or disposing of marital assets pending a merits hearing and attorney fees. R. pp. 41-46. Husband responded seeking a divorce on the ground of continuous separation for one year, equitable apportionment of the marital estate and an award of attorney fees. R. pp. 47-49.

The first substantive order in the case came from Wife’s December 3, 2019, motion for temporary relief which occurred more than nineteen (19) months after the action was filed. R. pp. 35-40. Although Wife requested a merits hearing on September 12, 2019, the trial did not occur until June 15-16, 2020.<sup>1</sup>

Immediately before the merits hearing, the parties were able to settle the issues of their adult disabled daughter’s custody and support and they also agreed to place the marital home on the market for sale. R. pp. 3-5. After a two day trial, the family court granted the parties a divorce on the ground of continuous separation for one year. R. p. 30. The family court ruled in Wife’s favor on nearly all of the remaining issues. The marital home mortgage balance was valued at the date of trial rather than the date of filing. R. p. 15. Wife was awarded \$40,000.00 from Husband’s nonmarital retirement accounts. R. p. 17. The court accepted Wife’s opinion of

---

<sup>1</sup> The merits hearing was continued two times by no fault of the parties—once because the judge assigned to hear the case had a conflict and once due to the South Carolina Supreme Court’s moratorium on non-emergency proceedings during the COVID-19 pandemic.

value for nearly all of the remaining marital property and debt. R. p. 17. Wife was awarded monthly alimony of \$2,700.00 and \$10,000.00 in attorney fees. R. pp. 26-30.

Husband filed a motion for reconsideration on September 1, 2020. After a December 9, 2020, hearing, the family court denied Husband's motion and awarded Wife additional attorney fees of \$1,200.00. R. pp. 33-34.

On January 6, 2021, Husband filed a Notice of Appeal of the Final Divorce Decree and the Order Denying Motion for Reconsideration.

### **STATEMENT OF FACTS**

This is a long-term marriage that ended when Wife left the parties' home in April 2018 without telling Husband she was leaving. R. p. 131, lines 3-5; p. 135, lines 13-15. According to Wife, the marriage permanently changed in 2009 when Husband's mood and temperament worsened after he suffered a traumatic head injury in an auto accident. R. p. 71, line 1-p.73, line 14. Neither party alleged a fault ground for divorce.

The parties' marriage was traditional in the sense that Husband worked outside the home and provided all of the family's financial support while Wife worked as a homemaker and cared for the parties' children. R. p. 56, line 14-p. 57, line 5. Three of the parties' four children, all of whom were adopted, emancipated in the years prior to Wife filing this case. R. p. 3. There was no dispute that the parties' twenty-two year old daughter suffered from bipolar disorder and required her parents' ongoing support. R. p. 50, line 18-p. 51, line 15; p. 65, lines 20-24. This marriage was Wife's second and Husband's third. R. p. 135, line 21-p. 136, line 11. At the time of trial, Wife was sixty-seven years old and Husband was sixty-five. R. p. 53, lines 9-11; p. 171, lines 19-24. Husband worked as a self-employed chiropractor prior to and throughout the marriage. R. p. 172, lines 10-22.

In the nineteen months between the filing of the case and the temporary hearing, Husband voluntarily paid Wife \$1,300.00 per month in spousal support along with various other expenses for Wife's benefit. R. p. 116, line 17-p. 118, line 20; pp. 757-779. Husband also continued to pay for Wife's health insurance, car insurance and cell phone through his business as he had done during the marriage. R. p. 200, line 23-p. 201, line 24.

The marital estate consisted of a home, an investment account, personal property, several bank accounts and two credit card debts. R. p. 296, p. 666. One of the significant issues at trial was the character of three additional retirement accounts in Husband's name which were fully funded from the rollover of two vested retirement plans that Husband acquired prior to the parties' marriage. R. p. 88, lines 15-18; p. 190, line 22-p. 195, line 13. Wife believed that these three retirement accounts were marital property. R. p. 88, lines 6-24.

Husband remained in the marital home after Wife filed this action and he paid the first mortgage and line of credit during the pendency of the action. R. p. 136, line 23-p. 138, line 11; p. 179, lines 9-14; p. 238, lines 4-24. Between the date of filing and the date of trial Husband reduced the first mortgage principal balance by \$45,243.19. R. p. 179, line 9-14; p. 180, lines 4-19; p. 671; p. 677. Wife did not contribute to the mortgage payments after the action was filed. R. p. 238, lines 12-18. The parties estimated that the net proceeds from the sale of the home would exceed \$250,000.00. R. p. 296; p. 666. In the months prior to the merits hearing Husband used money from the marital investment account to make repairs to the home in anticipation of listing it for sale. R. p. 243, lines 12-25.

Husband worked hard during the marriage supporting the parties' large family, and at age sixty-five, he admitted that he was not physically capable of working as hard as he did during the marriage. R. p. 170, line 8-p. 172, line 22. At the time of trial, Husband earned income of just

over \$58,000.00 per year. R. p. 173, line 2-p. 176, line 25. Given his age and health, Husband was concerned that he would be unable to pay alimony years into the future. R. p. 209, lines 2-19. Wife's income of \$18,535.00 per year was made up of her social security benefit and the child's disability benefit. R. p. 114, lines 12-21; pp. 736-741.

### STANDARD OF REVIEW

Decisions of the family court are subject to de novo review by an appellate court.<sup>2</sup> *Stoney v. Stoney*, 422 S.C. 593, 813 S.E.2d 486 (2018). De novo review is the broadest form of appellate review because it permits an appellate court to make findings of fact based on its own view of the preponderance of the evidence “notwithstanding the presence of evidence supporting the trial court’s findings.” *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-655 (2011).

An appellant must persuade this court that the lower court committed error or that the preponderance of the evidence is against the trial court’s findings. *Tomlinson v. Melton*, 428 S.C. 607, 611-612, 837 S.E.2d 230, 232 (Ct. App. 2019). Though a trial judge is better situated to evaluate a witness’s credibility and assign “comparative weight” to the witness’s testimony, the appellate court’s authority to review the record de novo is not diminished. *Lewis v. Lewis*, 392 S.C. at 390, 709 S.E.2d at 654.

Most of the errors at trial were not a result of an inaccurate assessment of a witness’s credibility. Husband primarily takes issue with the trial court’s application of the law to the undisputed facts.

---

<sup>2</sup> An abuse of discretion standard is applied to the review of evidentiary and procedural rulings. *Stoney v. Stoney*, 422 S.C. 593, 813 S.E.2d 486, FN2 (2018). The Appellant is not seeking review of an evidentiary or procedural ruling.

## ARGUMENT

### I. THE FAMILY COURT LACKED JURISDICTION TO DIVIDE HUSBAND'S NONMARITAL RETIREMENT ACCOUNTS.<sup>3</sup>

The family court erred when it awarded Wife \$40,000.00 from Husband's three nonmarital retirement accounts. R. p. 17.

Marital property is all real and personal property acquired by the parties during the marriage and owned by one of the parties on the date of filing; however, property acquired by either spouse prior to the marriage is generally nonmarital property and not subject to equitable division. S.C. Code Ann. §20-3-630(A)(2)(2014). Property retains its nonmarital character when it is exchanged for other property during the marriage provided it is not transmuted. S.C. Code Ann. §20-3-630(A)(3)(2014). Passive gain in the value of a nonmarital asset during the marriage does not change the nonmarital character of the asset. S.C. Code Ann. §20-3-630(A)(5)(2014). *Johnson v. Johnson*, 296 S.C. 289, 294, 372 S.E.2d 107, 110 (Ct.App.1988).

Once the family court determines that property is nonmarital it lacks jurisdiction and authority to apportion it. S.C. Code Ann. §20-3-630(B)(2014). *See also Bowen v. Bowen*, 327 S.C. 561, 566, 490 S.E.2d 271, 273 (Ct.App.1997) (family court was not permitted to address real estate excluded from the marital estate by a prenuptial agreement). It is error for a family court to include nonmarital property in the marital estate. *Ferguson v. Ferguson*, 300 S.C. 1, 5, 386 S.E.2d 267, 269 (1989) *superseded in part by* S.C. Code Ann. 20-3-130(B)(1).

“A party claiming an equitable interest in property upon divorce bears the burden of proving the property is marital.” *McMillan v. McMillan*, 417 S.C. 583, 591, 790 S.E.2d 216, 220 (Ct.App.2016) (citation omitted). “If the party presents evidence to show that the property is

---

<sup>3</sup> The family court refers to these accounts in the Decree as the “contested Stifel Accounts ending 6209, 8368, 2494.” R. p. 15. Appellant refers to these accounts throughout the brief as “Stifel Accounts.” The Stifel Accounts are distinct and separate from the 2142 Account discussed in Section II (b).

marital, the burden shifts to the other spouse to present evidence to establish the property's nonmarital character." *Id.* "If the opposing spouse can show that the property was acquired before the marriage or falls within a statutory exception, this rebuts the prima facie case for its inclusion in the marital estate." *Id.* (citation omitted).

A party need not present documentary evidence at trial supporting the origin or value of property; rather, uncontradicted testimony will suffice to carry one's burden of proof. *Wilburn v. Wilburn*, 403 S.C. 372, 385-386, 743 S.E.2d 734, 741 (2013).

Prior to the parties' marriage, Husband acquired a vested interest in the CMI of Florence, Inc. Profit Sharing Plan & Trust ("Profit Sharing Plan") and the CMI of Florence, Inc. Money Purchase Pension Plan ("Pension"), both of which were a benefit provided to Husband and his employees by his chiropractic clinic. R. p. 192, line 7-p. 193, line 4; p. 252, lines 20-25. Husband testified that he contributed to these plans from 1983 through 1997. R. p. 252, lines 20-25. In 1997, approximately two years prior to marrying Wife, Husband determined that the cost to his chiropractic clinic of funding the Profit Sharing Plan, the Pension and group health insurance for himself and his employees was cost-prohibitive. R. p. 192, lines 7-21. Husband and his staff decided to terminate the Profit Sharing Plan and Pension in favor of maintaining group health insurance. R. p. 192, lines 7-19. The Profit Sharing Plan and Pension plans were terminated in 1997. R. p. 192, lines 7-21.

At trial, Husband placed into evidence Certificates for the Profit Sharing Plan and Pension showing his vested interests in the plans as of December 31, 1996, were valued at \$309,907.99 and \$219,619.17, respectively. R. p. 681; p. 194, lines 11-23. During discovery, Husband provided Wife with statements from the Profit Sharing Plan and Pension for 1994, 1995 and 1996 showing the value of the plans for several years immediately prior to the marriage.

R. p. 192, line 25- p. 193, line 4. Neither party was able to acquire statements from the Profit Sharing Plan or Pension reflecting the balance of the accounts on May 15, 1999, which was the date of the parties' marriage. R. p. 252, lines 3-9; p. 253, line 23-p. 254, line 16; p. 90, line 15-p. 91, line 9; p. 140, lines 2-14. Husband testified that some records burned in a fire and some records were no longer available from the administrator because they were too old. *Id.*

Husband rolled his Profit Sharing Plan and Pension plan assets to IRAs that ultimately came to be managed by a Stifel Nicolaus advisor. R. p. 193, line 5-p. 194, line 10. Prior to Husband moving the assets to Stifel in 2004, the investments were managed by an Edward Jones advisor. R. p. 193, line 19-p. 194, line 10. Husband was unable to produce documents tracing the flow of his Profit Sharing Plan and Pension plan assets to the Stifel Nicolaus IRAs because so much time had elapsed since the investments were rolled to Stifel Nicolaus. R. p. 262, line 20-p. 263, line 2. Husband and Wife stipulated that the total value of the three Stifel Accounts as of the date of filing was \$767,910.51 and the total value at the time of trial was \$757,058.96. R. p. 191, line 2-p. 192, line 2; p. 680.

Husband testified that he did not make any contributions to the Profit Sharing Plan, the Pension nor the successor accounts after the Profit Sharing Plan and Pension plans were terminated in 1997 nor did he make any contributions to the successor accounts during the marriage. R. p. 192, lines 22-24; p. 195, lines 11-13; p. 253, lines 23-25. Wife did not present testimony or documents showing that the parties contributed to the Profit Sharing Plan and Pension during the marriage. R. p. 88, line 6-p. 92, line 1; p. 139, line 20-p. 140, line 22. Wife offered no evidence contradicting Husband's testimony that he made no contributions to the Profit Sharing Plan, the Pension nor the Stifel Accounts during the marriage. R. p. 88, line 6-p.91, line 20; p. 140, lines 2-14.

On cross-examination, Wife's attorney pressed Husband to prove that he did not contribute to the Profit Sharing Plan and Pension during the marriage. R. p. 253, line 23-p. 254, line 18. Husband speculated that the parties' joint tax filings from early in the marriage would show that he made no retirement contributions, but the tax records were lost in a fire. R. p. 253, line 23-p. 254, line 18; p. 140, lines 15-22.

Wife argued at trial that the Stifel Accounts were marital property. R. p. 88, lines 15-24. Wife's belief was based solely on statements she claimed Husband made to her during the marriage. R. p. 88, line 6- p. 90, line 8. Wife testified that she and Husband discussed eventually moving to a local retirement community when husband semi-retired or retired. R. p. 88, line 21-p. 89, line 14. Based on these conversations, Wife assumed that Husband was saving money for retirement during their marriage, but she testified to this only after her attorney prompted this response during direct examination. R. p. 89, line 15-p. 90, line 8. Wife felt that any money Husband was saving for retirement would have been placed in his Stifel Accounts, but she acknowledged this was merely her opinion. R. p. 90, lines 1-5. Husband had no recollection of telling Wife that he planned to use his nonmarital Stifel Accounts to fund a move to a local retirement community. R. p. 194, line 25-p. 195, line 13. Wife recalled and confirmed that Husband's clinic terminated the Profit Sharing Plan and Pension in favor of health insurance for employees. R. p. 140, lines 5-14. Wife also remembered that the Profit Sharing Plan and Pension, when it terminated, would "roll over." R. p. 140, lines 5-14.

Wife, as the party claiming an equitable interest in the Stifel Accounts, bears the burden of proving that the accounts are marital property. *Taylor-Cracraft v. Cracraft*, 417 S.C. 570, 576, 790 S.E.2d 423, 426 (Ct.App.2016). The parties stipulated that the Stifel Accounts existed on the date of filing, April 12, 2018. R. p. 190, line 22-p. 192, line 2; p. 680. With it being

established that the Stifel Accounts were created during the marriage and that they existed on the date of filing, the burden shifts to Husband to prove that the Stifel Accounts, and the passive gain on the accounts during the marriage, are not marital property. *Wilburn v. Wilburn*, 403 S.C. 372, 383, 743 S.E. 2d 734, 740 (2013). At trial, Husband testified that the Stifel Accounts were acquired in exchange for the Profit Sharing Plan and Pension which were created prior to his marriage to Wife. R. p. 193, line 22-p. 195, line 13. Husband also testified that the value of the Stifel Accounts grew passively during the marriage and growth was not due to any direct contribution made during the marriage. R. p. 192, lines 22-24; p. 195, lines 11-13; p. 253, lines 23-25. Wife did not offer testimony or other evidence showing that contributions were made to the accounts during the parties' marriage. R. p. 88, line 6- p. 91, line 13; p. 139, line 20-p. 140, line 22. Wife never alleged that the Stifel Accounts, nor the predecessor Profit Sharing Plan, Pension or Edward Jones accounts were ever titled to her.

Husband, on the other hand, presented several types of evidence to support his position and rebut the presumption that the Stifel Accounts were marital. In addition to testifying about the nature of the Profit Sharing Plan, Pension and the Stifel Accounts, the value of the Profit Sharing Plan, Pension and Stifel Accounts, the absence of contribution to any of the accounts during the marriage and the tracing of all of the accounts, Husband presented the December 31, 1996, statements from the Profit Sharing Plan and Pension plans which reflected the value of the accounts immediately prior to their termination in 1997. R. p. 680. Husband also presented the Stifel Account values as of the date of filing and the date of trial and Wife stipulated to both values. R. p. 190, line 22-p. 192, line 2; p. 680.

At trial, Wife’s position that the Stifel Accounts were marital in nature was based solely on her belief that Husband’s testimony and the documents he placed in evidence were not sufficient to carry his burden and rebut the presumption.<sup>4</sup> R. p. 272, line 6-p. 273, line 1; pp. 33-34. The trial court stated, “It is also odd that the [Husband] presented no documentary evidence to confirm his assertion that he did not make any contributions to these accounts during this nineteen (19) year marriage.” R. p. 33-34. The trial court ultimately held that a “portion of these accounts are marital in nature.” *Id.*

Appellate courts have held, however, that undisputed testimony from a spouse is sufficient to rebut the presumption.

In *Chanko v. Chanko*, husband argued that a portion of his Fluor Daniel 401k was his nonmarital property because he worked for the company for seven years prior to the marriage. *Chanko v. Chanko*, 327 S.C. 636, 640-643, 490 S.E.2d 630, 633 (Ct.App.1997). Husband testified that the 401k was worth approximately \$75,000 at the time the parties married and he testified that he had statements supporting this value, but he did not bring the statements with him to trial. *Chanko v. Chanko*, 327 S.C. at 641-642, 490 S.E.2d at 633. Wife’s counsel objected to husband testifying to the value of the account prior to the marriage because husband was a lay witness, not an expert. *Id.* at 641. The trial judge overruled the objection and indicated

---

<sup>4</sup> Wife did not argue at trial that the Stifel Accounts were marital assets because they were transmuted:

“THE COURT: So I would like you-all to be prepared to give a brief closing statement at the end as far as setting out...what you feel this Court needs to especially pay attention to and also the equitable division. In particular, needless to say, the biggest asset is—there’s a contest over if it’s martial [sic] or nonmarital. I didn’t hear any testimony, Mr. Barth. Are you alleging that even if there’s been no contribution that that should be transmuted or what—or not? I haven’t heard any testimony as far as transmutation is concerned.

WIFE’S COUNSEL: I do not believe we’ve asserted a claim for transmutation, Your Honor. The—the issue is whether or not there were contributions during the marriage to contribute towards the increase in values.”

R. p. 204, line 22-p. 205, line 12; *see also* R. p. 88, line 21-p. 90, line 8.

that he would weigh the evidence appropriately. *Id.* The Court of Appeals acknowledged that husband's testimony was vague and that expert or documentary evidence would have been more compelling, but nevertheless held that Husband carried his burden of proving that \$75,000.00 of his Fluor Daniel 401k was his nonmarital property because wife offered no evidence of transmutation of the portion of the account that husband earned prior to the marriage nor did wife dispute the value husband assigned to the premarital portion of the account. *Chanko v. Chanko*, 327 S.C. at 641-642, 490 S.E.2d at 633.

In *Wilburn v. Wilburn*, husband argued that wife failed to carry her burden of proving the nonmarital character of her bank and investment accounts because she did not offer documents into evidence. *Wilburn v. Wilburn*, 403 S.C. 372, 385-386, 743 S.E.2d 734, 741 2013. The South Carolina Supreme Court held that wife's testimony about the source of funds for her nonmarital bank and investment accounts was sufficient to carry her burden of proving that the accounts were her nonmarital property particularly when husband failed to offer any evidence controverting wife's testimony. *Wilburn v. Wilburn*, 403 S.C. at 386, 743 S.E.2d at 741-742.

In *McMillan v. McMillan*, this Court held that husband carried his burden of proving the nonmarital character of his retirement account by submitting a financial declaration and offering testimony from a business valuation expert who repeated husband's self-report of the account value. *McMillan v. McMillan*, 417 S.C. 583, 597-598, 790 S.E.2d 216, 223-224 (Ct.App.2016). Wife did not testify or offer any evidence disputing husband's testimony. *Id.*

In this case, Wife did not dispute Husband's testimony that the Stifel Accounts came from Profit Sharing Plan and Pension earned prior to the marriage. R. p. 88, line 6-p. 91, line 20; p. 139, line 20-p. 140, line 14. Wife affirmed Husband's testimony that the Profit Sharing Plan and Pension were terminated by his company in favor of health insurance. She acknowledged

that the Profit Sharing Plan and Pension were going to “roll over” when they were terminated. R. p. 140, lines 5-12. Wife did not dispute the value Husband assigned to the Profit Sharing Plan and Pension and the Stifel Accounts. R. p. 191, line 2-p. 192, line 2. Wife offered no evidence that Husband contributed to the Profit Sharing Plan and Pension accounts or the successor Stifel Accounts during the parties’ marriage. R. p. 88, line 6-p. 91, line 20; p. 139, line 20-p. 140, line 14.

In the Final Divorce Decree, the Court accurately described testimony from both parties that the Profit Sharing Plan and Pension were terminated prior to the parties’ marriage. R. p. 16. The Court also accurately described Husband’s testimony that he did not make any contributions to any of the accounts after the parties married. R. p. 16. The Court wrote, “[n]either party was able to obtain any evidence about...contributions or withdrawals from those accounts for the last twenty (20) to twenty-one (21) years.” R. p. 16.

Despite accurately describing the evidence presented at trial, the Court ordered Husband to pay Wife \$40,000.00 from the Stifel Accounts and required Husband to bear the full tax consequence associated with the payment. R. p. 17. The Court wrote,

“[i]t is very difficult for this Court to determine whether any contributions or withdrawals were made by the Defendant over the course of the marriage. It is obvious to the Court that these accounts were originally non-marital. **But, if in fact there were any contributions made during the marriage, those contributions would of course be marital in nature.** The Court must also attempt to look at fluctuations in the market over the last twenty (20) to twenty-one (21) years.”  
R. p. 17. *emphasis added*

The very language of the trial court’s order, emphasized in the quote above, indicates that there was no evidence presented at trial of contributions to the Profit Sharing Plan, the Pension, the Edward Jones accounts nor the Stifel Accounts during the marriage. The court reiterated this

finding on reconsideration when it held that “a portion of these accounts are marital in nature.” R. pp. 33-34.

The record does not support the court’s finding that Wife is entitled to an interest in Husband’s nonmarital Stifel Accounts. Once the court determined that the Stifel Accounts were nonmarital, it had no jurisdiction to award Wife an interest in the Accounts. Furthermore, it is improper for the court to find that contributions were made to Husband’s Stifel Accounts or the predecessor accounts in the absence of evidence proving as much.

**a. Wife is not entitled to special equity in Husband’s nonmarital Stifel Accounts.**

Although Wife argued at trial that her interest in the Stifel Accounts derived from the marital nature of the property, some of her testimony about her indirect contributions to the marriage could be interpreted as an argument for a special equity interest in Husband’s nonmarital Stifel Accounts. The only way Wife could gain an interest in Husband’s nonmarital Stifel Accounts is to prove that she contributed to the assets’ value after the parties married. S.C. Code Ann. §20-3-630(A)(5).

The “special equity doctrine” was described by the Court of Appeals as follows:

“Where a wife has made a material contribution to the husband’s acquisition of property during coverture, she acquires a special equity in the property.” *Wilson v. Wilson*, 270 S.C. 216, 241 S.E.2d 566, 568 (1978) (quoting 27B C.J.S. Divorce § 293 (1950)). Therefore, one spouse acquires a special equity in the property of the other if (1) the property was acquired during coverture, (2) the spouse contributed to the acquisition of the property, and (3) the spouse’s contribution was material. *Webber v. Webber*, 285 S.C. 425, 427-28, 330 S.E.2d 79, 81 (Ct. App. 1985).

The only evidence in the record is that the growth in the Stifel Accounts was passive, i.e. due to market forces and reinvestment of nonmarital interest and dividends. Passive growth, by its very nature, is not attributable to a party’s efforts. Wife is not entitled to special equity in

Husband's nonmarital Stifel Accounts because the increase in value is not a result of any material contribution from Wife during the marriage.

## **II. THE DATES ON WHICH THE FAMILY COURT VALUED CERTAIN ASSETS AND DEBT WERE INCORRECT.**

### **a. The family court erred in valuing the mortgage debt on the date of trial.**

“By statute, marital property subject to equitable distribution is presumptively valued at the date of divorce filing.” *Moore v. Moore*, 414 S.C. 490, 522, 779 S.E.2d 533, 550 (2015). In certain circumstances, however, the parties may be entitled to share in any appreciation or depreciation in marital assets that occurs during the pendency of the action. *Id.* The burden is on the party seeking deviation from the statutory filing date. *Burch v. Burch*, 395 S.C. 318, 329, 717 S.E.2d 757, 763 (2011).

A spouse seeking to use the value of an appreciated asset on the date of trial must show that the increase in the asset's value is due to passive, or market, forces. *Teeter v. Teeter*, 408 S.C. 485, 499, 759 S.E.2d 144, 151 (Ct.App.2014). The only activities relevant to the passive/active analysis are those which occur after the date of filing. *Burch v. Burch*, 395 S.C. at 327-328, 717 S.E.2d at 762. *See also Moore v. Moore*, 414 S.C. at 522-523, 779 S.E.2d at 550 (affirming that husband's contributions to the company during the marriage were accounted for in the value of the company at the date of filing and further finding that wife's active management of the company after the date of filing was the primary factor in the company's growth during the pendency of the action).

Our courts have long recognized that valuing a marital asset on the date of filing may not necessarily result in a fair outcome if the value of the asset changes during the pendency of the action. *See Burch*, 395 S.C. at 326-327, 636 S.E.2d at 762 (acknowledging that it is not unusual for the value of assets to change in the period of time between an action being filed and

disposition). In order to fairly value an asset that appreciates or depreciates between the date of filing and the date of trial, courts prior to *Burch* tended to look to the reason for the increase or decrease in the asset's value when determining the appropriate date of valuation. *Id.* at 326, 636 S.E.2d at 762. When an asset increased in value due to the financial or managerial contribution of one of the spouses, courts generally valued the asset on the date of filing. *Id.* An asset that increased in value due to passive forces out of the control of either spouse tended to be valued on the date of trial. *Id.* On October 31, 2011, the South Carolina Supreme Court formally adopted the active and passive distinction for deciding the appropriate date on which to value a marital asset. *Id.* at 328, 636 S.E.2d at 762-763.

In *Burch*, the Supreme Court explained that this active/passive distinction is based in equity and in public policy.

“In making the public policy argument for the active and passive distinction it has been said: It is fairer to value a passive asset at or near the time of the final hearing, because both parties are equally deserving to share in any increase or decrease... [On the other hand,] active assets should be valued at the time of commencement [or filing] of the marital litigation, to enable the person who causes the change in value to receive the benefits of his or her labor and skills or, conversely, to prevent the person who controls the assets from manipulating the value downward during litigation.” *Id.* at 328. quoting Roy T. Stuckey, *Marital Litigation in South Carolina* 310 (3<sup>rd</sup> ed., 2001).

The *Burch* Court identified several instances when equity supported the use of a certain valuation date to account for active and passive appreciation/depreciation of an asset. *Burch*, 395 S.C. at 326-327, 636 S.E.2d at 762. For example, the date of trial was used when the value of a retirement account increased solely due to market forces; the date of filing was used when spouse depleted his retirement account prior to trial; the date of filing was used when spouse purposely destroyed business during litigation; the date of trial was used when the value of a

spouse's business decreased due to market forces during the pendency of the action. *Burch*, 395 S.C. at 326-327, 636 S.E.2d at 762 (citations omitted).

Cases decided after *Burch* affirmed that the date of filing is the proper valuation date when the value of an asset increases due to the efforts of one spouse. *See Moore v. Moore*, 414 S.C. 490, 522-523, 779 S.E.2d 533, 550-551 (2015) (date of filing used when increase in value of a business was primarily attributable to wife's managerial efforts and decisions); *Teeter v. Teeter*, 408 S.C. 485, 499, 759 S.E.2d 144, 151 (Ct.App.2014) (date of filing used when husband's expertise and efforts caused the business revenues to increase after marital litigation began).

In *McDavid v. McDavid*, the South Carolina Supreme Court applied this active/passive analysis to home equity created by one spouse during the pendency of marital litigation.<sup>5</sup> Mrs. McDavid paid the former marital home mortgage during the pendency of the action which created more equity in the asset by the time the case went to trial. *McDavid v. McDavid*, 333 S.C. 490, 497 n.7, 511 S.E.2d 365, 369 n. 7 (1999). Husband argued that the trial court should have used the mortgage balance as of the date of trial for purposes of equitable division. *McDavid*, 333 S.C. at 497, 511 S.E.2d at 369. The Court held that absent evidence of husband's contribution to the mortgage payments during the pendency of the action, husband was not entitled to the increase in home equity resulting directly from mortgage payments made by wife between the date of filing and the date of trial. *Id.* Notably, the Supreme Court distinguished the facts of *McDavid*, which involved active appreciation of an asset specifically attributable to one spouse, from the facts of prior cases endorsing the sharing of passive gains. *Id.* at 497, n. 7. The

---

<sup>5</sup> *McDavid* was decided twelve years before the active and passive distinction was formally adopted in *Burch*.

*McDavid* court endorsed the active/passive distinction long before it was formally adopted in *Burch*.

Although this specific issue was not on direct appeal in *Wilburn v. Wilburn*, the South Carolina Supreme Court endorsed the trial court's classification of the marital home mortgage balance reduction as husband's nonmarital property because he was solely responsible for making the mortgage payments during the pendency of the action. *Wilburn v. Wilburn*, 403 S.C. 372, 389, 743 S.E.2d 734, 743 (2013).<sup>6</sup>

The facts in the case at hand are not disputed. The home is marital property. R. p. 84, lines 1-10; p. 238, lines 7-11. Wife moved out of the marital home on April 7, 2018, and filed this action days later on April 12, 2018. R. p. 80, line 21-p. 81, line 2; p. 42; p. 47. Husband voluntarily paid the first and second mortgages on the marital home during the pendency of the action and he did so without any contribution from Wife. R. p. 136, lines 19-p. 137, line 10; p. 183, lines 5-22; p. 238, lines 1-24; p. 36. The first mortgage balance on the date of filing was \$109,160.00 and \$63,917.00 on the date of trial. R. p. 179, line 9-14; p. 180, lines 4-19; p. 667. Husband was solely responsible for reducing the first mortgage balance by \$45,243.00 between the date of filing and the date of trial. R. pp. 179, lines 9-14; p. 238, lines 12-18; p. 667. The second mortgage was an interest-only payment credit line and the principal balance remained the same throughout the litigation. R. p. 179, lines 3-8.

In its final order, the court valued the mortgage balance on the date of trial and ordered the parties to equally divide the proceeds generated from the sale of the home. R. p. 15. In making this finding, the trial court reasoned that 1) Husband's payment of the first mortgage

---

<sup>6</sup> The *Wilburn* court described the mortgage principal reduction as "nonmarital property" rather than active appreciation. Despite the difference in terminology, the analysis used by the Court was consistent with *Burch*. The *Wilburn* court did not state why they used the term "nonmarital property."

during the pendency of the action maintained the status quo from the marriage; and 2) had Husband not been living in the marital home and paying the mortgages during the parties' separation, he would have incurred housing expenses "for which he would have received no equity." R. p. 14.

The trial court's failure to apply the active appreciation analysis endorsed in *McDavid* and adopted in *Burch* is an error that requires reversal. Under a *Burch* analysis, the proper valuation date for the home equity is April 12, 2018, the date of filing. S.C. Code Ann. §20-3-630(A).

In order to deviate from this valuation date, Wife must prove that the decrease in the mortgage principal balance was attributable to passive forces such as market fluctuation. Wife produced no evidence at trial that the \$45,243.00 mortgage principal reduction came from any other source but Husband. The line of cases preceding *Burch* and the cases after *Burch* do not endorse any of the factors used by the trial court in this case, i.e. the financial status quo during the marriage and the parties' comparative post-separation housing expenses.

There appears to be only one reported case where an appellate court used an analysis other than the active/passive distinction to determine the date of valuation for equity created during litigation solely due to one spouse's payment of the mortgage. *Barrow v. Barrow*, 394 S.C. 603, 716 S.E.2d 302 (Ct.App.2011). *Barrow* is not analogous to the case at hand and it is error for the court to rely on it.

In *Barrow*, both spouses managed their money poorly and made poor financial decisions during the marriage. Wife alleged that \$40,000.00 she contributed to the marital home down payment was a loan from her mother. *Barrow*, 394 at 612-613, 716 S.E.2d at 307-308. The trial court gave wife credit for the loan balance owed to her mother as of the date of trial. *Id.* at 612.

Husband appealed this ruling and also argued that he was entitled to credit for the reduction in the mortgage balance he paid after the parties separated. *Id.* at 612-617.

The Court of Appeals modified the trial court's division of marital property and ordered that the marital home equity be divided equally. *Id.* at 618. The Court identified the money from wife's mother as "special equity" in marital property to be divided by the parties equally. *Id.* at 613-614. The Court denied husband's request for credit for the mortgage payments he made after separation. *Id.* at 617. This decision had the effect of classifying all of the marital home equity as marital property and apportioning it equally. *Id.* at 618. The only explanation given by the Court for denying husband's request for credit for the mortgage balance reduction was that the parties each incurred equal housing expenses post-separation. *Id.* at 617. Taking the *Barrow* opinion as a whole, the Court of Appeals believed that an equal division of the marital estate was justified because both spouses lacked credibility and both spouses contributed to the poor financial condition of the marriage.

There does not appear to be a reported case that endorses the trial court's consideration of the financial status quo when determining the date on which an asset should be valued.

The family court's reasons for including the \$45,243.00 mortgage principal reduction in the marital estate are not supported by law or equity. First, the court found that Husband's voluntary payment of the mortgage during the pendency of the action maintained the *status quo* of the parties' marriage which did not entitle him to credit for the payments. The trial court intended for the parties to benefit from an economic partnership typical of a marriage even after separation. R. p. 14. Second, the court reasoned that had Husband lived somewhere other than the marital home during the pendency of the action, he would have paid rent, an activity that would not have generated equity. *Id.*

“The doctrine of equitable distribution is based on a recognition that marriage is, among other things, an economic partnership.” *Bodkin v. Bodkin*, 388 S.C. 203, 217, 694 S.E.2d 230, 238 (Ct. App. 2010) (citation omitted). The law protects a homemaker’s interest in marital property by assigning value to her indirect contribution to the accumulation of the marital estate. *Johnson v. Johnson*, 296 S.C. 289, 298, 372 S.E.2d 107, 112 (Ct. App. 1988). A homemaker’s indirect contributions to a marriage in the form of caring for the parties’ home and children enables the other spouse to work outside the home and accumulate wealth for the parties’ mutual benefit. *Johnson v. Johnson*, 296 S.C. at 299, 372 S.E.2d at 112. The equitable apportionment statute specifically requires the family court to consider and give weight to a homemaker spouse’s contribution in apportioning marital property. S.C. Code Ann. §20-3-620(B)((3).

However, it stands to reason that a homemaker spouse’s contribution to the marriage and the accumulation of the marital estate necessarily ends when the homemaker moves out of the marital home and leaves the marriage. By equally dividing the equity accrued after Wife moved out of the marital home, the trial court assigned value to an indirect contribution that Wife did not make and could not make. When Wife left the marital home on April 7, 2018, her ability to care for the home ended and Husband became responsible for caring for the marital home *and* providing all of the financial support for Wife and their disabled daughter. The *status quo* the trial court attempted to achieve in this ruling is simply not possible. It is also not fair to Husband to give Wife a share of the equity Husband created when he no longer benefited from Wife’s support as a homemaker.

Notably, the family court afforded Husband full reimbursement for the reduction in mortgage principal he will make from the date of trial until the home is sold. R. p. 15. There is

no difference in the parties' respective contributions to the creation of home equity in the period between the date of filing and trial and the period between trial and the sale of the home.

The family court's second reason for including the mortgage principal reduction in the marital estate has the effect of awarding Wife retroactive *pendente lite* spousal support which the court has no authority to do. The court held, "If the [Husband] had not been living in the marital home during the pendency of this action, he would have had to pay rent somewhere else for which he would have received no equity." R. p. 14. By allowing Wife to share in the home equity created by Husband after the date of filing while she was also receiving temporary financial support from Husband, the trial court allowed Wife to "double dip."

Husband voluntarily paid Wife direct support and additional expenses for her benefit totaling approximately \$3,000.00 per month from the time Wife left the marital home until he was ordered to pay similar support at the temporary hearing. R. p. 116, line 20-p. 118, line 12; p. 122, lines 18-24. Wife used Husband's support payments to pay rent of approximately \$1,600.00 to her mother. R. p. 113, lines 2-19.

In addition to paying more than \$3,000.00 per month for Wife's benefit during the pendency of the action, Husband serviced the marital home first mortgage of \$2,660.84 per month and the interest-only line of credit of \$400.00-\$500.00 per month during the pendency of the action. R. p. 180, line 4-p. 181, line 6; p. 669; p. 677. If Wife is permitted to share in half of the mortgage principal that Husband paid while the case was pending, she will receive the equivalent of nearly \$3,900.00 per month in support even though Husband was not ordered to pay support until six months prior to the hearing.

The court reasoned that Husband would have been paying rent had he not been paying the mortgage during the pendency of the case and implied that his claim to all of the mortgage

principal reduction was unfair to Wife. Husband, however, was paying Wife temporary alimony in amount nearly equal to her rent in addition to \$500.00 towards Wife's credit card, her health insurance, Medicare supplement, prescription supplement, YMCA membership, car taxes and all of the child's uncovered medical expenses. R. p. 35-40. There was nothing inherently unfair to Wife because Husband was giving her more than \$3,000.00 per month in direct and indirect support. Had Husband not paid Wife any money during the pendency of the case or if he had paid Wife significantly less than her alleged housing costs, the trial court's finding may be necessary to achieve an equitable result. The court's holding, however, is unfair to Husband and it is not supported by law.

**b. The family court erred in valuing the marital investment account on the date of filing.**

Since marital property is presumed to be valued on the date of filing, Husband bears the burden of proving that the court should deviate from valuing property on the date the action is filed. *Burch v. Burch*, 395 S.C. 318, 329, 717 S.E.2d 757, 763 (2011). Equity and fairness requires that the marital investment account be valued on the date of trial, not the date of filing.

During the marriage, the parties placed proceeds from Husband's injury settlement into an account managed by Stifel Nicolaus ("2142 Account"). R. p. 666; p. 85, line 11-p. 86, line 15,<sup>7</sup> p. 138, lines 17-22. The parties agree that the 2142 Account is marital property. R. p. 85, line 11-p. 86, line 15; p. 138, lines 17-22, p. 181, lines 18-21. The value of the 2142 Account on the date of filing was \$85,144 and the value on the date of trial was 65,245.00. R. p. 86, lines 13-15; p. 296; p. 181, line 18-p. 182, line 2; p. 666. Husband withdrew \$40,000.00 from the 2142 Account after the temporary hearing and explained that he did so for several reasons which

---

<sup>7</sup> The trial transcript and the parties' marital asset addendums refer to the account as 2742, but the Divorce Decree refers to the account as 2142. The Appellant refers to the account as 2142 throughout this brief.

included his need to make several repairs to the marital home to prepare it for listing and sale. R. p. 182, line 3-p. 183, line 10. The record is unclear as to when Husband withdrew the money from the 2142 Account, but it appears to have occurred after the December 3, 2019, temporary hearing, but before the temporary order was filed on January 15, 2020. On December 17, 2019, Husband used \$5,000.00 of the \$40,000.00 to pay the attorney fee award from the temporary hearing. R. p. 182, line 3-13; p. 219, line 25-p. 220, line 1; p. 399-409, pp. 688-735. Wife did not file a contempt action alleging that Husband willfully violated the provision of the temporary order prohibiting the liquidation of assets pending a merits hearing. R. p. 37. Wife claimed that she did not know that the 2142 Account value decreased during the action. R. p. 87, lines 18-21. Of the \$35,000.00 remaining after Husband paid the attorney fees ordered at the temporary hearing, Husband estimated that he spent \$25,000.00 on home repairs and owed several thousand more for repairs that were in progress. R. p. 256, line 16-p. 257, line 12. Husband's bank statements and check images supported his testimony. R. pp. 424-444. Husband had a good-faith belief that investing in repairs to the marital home would significantly increase the home's sale price. R. p. 182, line 14-p. 183, line 10. Husband does not appeal the family court's holding that the \$5,000.00 attorney fee payment was classified as an advance on equitable division and allocated in equal shares to each party.

Husband requested that the court value the 2142 Account on the date of trial because the majority of the money he withdrew from the account was used to repair the marital home, the sale of which would ultimately benefit both parties. R. p. 181, line 18-p. 183, line 10; p. 242, line 11-p. 243, line 25.<sup>8</sup>

---

<sup>8</sup> Wife's counsel attempted to conflate and confuse Husband's testimony regarding his request for credit for mortgage principal reduction and his request to equally divide the home equity as of the date of filing and the 2142 Account balance as of the date of trial. R. p. 242, line 11-p. 243, line 25.

In valuing the 2142 Account as of the date of filing, the family court assessed the cost of all of the home repairs to Husband while allowing Wife to benefit from the increased value resulting from the repairs. Furthermore, this holding runs counter to the trial court's stated intention to divide the marital estate equally between the parties. R. p. 13.

The family court's use of the date of filing value for the 2142 Account should be reversed and the date of trial balance of \$65,245.00, plus \$5,000.00, should be used for purposes of equitable division taking into account the \$5,000.00 already allocated to each party by the family court's order.

**c. The family court erred in valuing the IHG credit card on the date of trial.**

“When a debt is incurred after the commencement of litigation but before the final divorce decree, the family court may equitably apportion it as a marital debt when it is shown the debt was incurred for marital purposes, i.e. for the joint benefit of both parties during the marriage.” *Wooten v. Wooten*, 364 S.C. 532, 547, 615 S.E.2d 98, 105 (2005). “When a debt is incurred after marital litigation begins, the burden of proving the debt is marital rests upon the party who makes such an assertion.” *Id.* at 547, 615 S.E.2d at 105. If a debt was incurred after the date of filing for nonmarital purposes, the family court can exclude it from the marital estate and require the spouse who created the debt to pay it. *Pruitt v. Pruitt*, 389 S.C. 250, 265, 697 S.E.2d 702, 710 (Ct.App.2010) (citation omitted).

In *Wooten*, husband filed for divorce in June 1999 and from June 1999 until December 1999 he paid the two mortgages on the marital home, but he did not voluntarily pay wife any additional support during this period. *Wooten*, 364 S.C. at 545, 615 S.E.2d at 105. Husband was ordered to pay alimony to wife at the December 1999 temporary hearing. *Id.* In the six months between the date of filing and the temporary order, wife incurred more than \$12,000.00

in credit card debt that she sought to include in the marital estate. *Id.* at 546. Although wife did not include the credit card statements in the record, she testified that the credit card debt was incurred for “groceries, dining out, veterinary bills, medications, gasoline, Christmas gifts, and tuition for their son.” *Id.* The Supreme Court refused to include the debt in the marital estate concluding that it was incurred after the date of filing and that wife failed to carry her burden of proving that the debt was incurred for the joint benefit of the parties during the marriage. *Id.* at 547. Notably, the Supreme Court and the Court of Appeals refused to speculate as to whether the family court could have required husband to reimburse wife for the credit card debt as an incident of support. *Wooten*, 364 S.C. at 547 n.2, 615 S.E.2d at 106 n.2.

In this case, Wife failed to carry her burden of proving that the balance of the IHG credit card at the time of trial debt was incurred for the joint benefit of both parties. Furthermore, Husband’s voluntary payment of support and a portion of this credit card debt during the pendency of the action eliminates Wife’s claim that she is entitled to reimbursement as an incident of support.

The IHG credit card (“IHG”) was titled solely in Wife’s name and used by Wife during the parties’ marriage. R. p. 99, lines 5-11; p. 244, line 14-p. 245, line 10. Wife charged personal expenses and expenses related to the parties’ dependent child to an IHG credit card during the pendency of the action. R. p. 99, line 5-p. 100, line 21; p. 184, line 13-p. 186, line 10. There was a zero balance on this credit card when the case was filed and a balance of over \$6,120.00 on the date of trial. R. p. 183, line 23-p. 184, line 1; p. 99, lines 12-13. Husband estimated that he paid \$13,000.00 on the IHG credit card during the pendency of the action, but the credit card balance at trial remained more than \$6,120.00. R. p. 185, line 10-p. 186, line 8. The parties acknowledged that during the marriage Wife used the IHG card to charge the child’s medical

expenses along with Wife's gas, lodging and food when she travelled to Charleston for the child's medical appointments or for consultations with providers when the child was institutionalized. R. p. 99, line 17-p. 100, line 6; p. 184, line 13-p. 186, line 14; p. 244, line 14-p. 245, line 12. Although Wife testified that Husband charged to the IHG account after the action was filed she failed to produce any evidence that he did so and she did not believe Husband even had a physical card for this account. R. p. 99, line 5-p. 100, line 9. On cross-examination, Wife testified that she wasn't even sure that Husband was a joint account holder on the IHG credit card. R. p. 158, lines 13-24. Husband testified that he received an alert from his credit monitoring service that someone added him to the IHG account in May of 2019 and he never testified that he charged items to the IHG credit card. R. p. 184, line 13-p. 186, line 14.

During the marriage, Husband typically paid the IHG balance off every month, but after the parties separated he typically paid \$500.00 per month towards the balance.<sup>9</sup> R. p. 297-386; p. 155, line 20-p. 159, line 23. The parties disagreed, however, as to what IHG charges Husband would pay for post-separation. Wife claimed that she believed that in addition to \$500.00 per month, Husband would also pay for all charges she made on IHG related to her visits to the parties' other children, her food and all of her gas. R. p. 147, line 25-p. 148, line 16; p. 100, line 7-p. 102, line 19. Husband testified that he never agreed to pay the personal expenses Wife charged to IHG after separation because he was concerned about her over-spending. R. p. 184, line 13-p. 186, line 14; p. 245, line 24-p. 250, line 13. Husband estimated that he paid \$13,000.00 on the IHG card between the date of separation and trial which was well in excess of the child's medical expenses that he agreed to pay. R. p. 184, lines 2-11; p. 248, lines 12-24.

---

<sup>9</sup> Husband paid the minimum payment to IHG between June/July 2019, which was the date of the parties' failed mediation, and December 2019 when he was ordered at the temporary hearing to continue paying \$500.00 per month towards the IHG balance. R. pp. 297-386, Temporary Order.

Wife admitted that since the action was filed she charged very few of the child's out-of-pocket medical expenses to the IHG card because Husband began paying the physicians directly. R. p. 100, lines 10-13. Wife's testimony about an alleged agreement for Husband to pay for items not related to the child's medical expenses and related travel is not credible because one of the issues before the court at the December 3, 2019, temporary hearing was Wife's request to use the IHG card and to require Husband to pay the account. R. p. 38; p. 100, line 7-p. 101, line 8. In that hearing, the family court required Husband to continue paying a minimum of \$500.00 per month on the IHG card. R. p. 39.

Husband concedes that a small amount of the charges Wife made to IHG after the date of filing were for marital purposes, but that he had long since paid for these during the litigation. Husband disagrees with the family court's finding that the \$6,120.00 balance on IHG is marital debt because the expenses charged to this account were not incurred for a marital purpose.

A review of the IHG statements reveals that many of the charges Wife made after the date of filing were of a personal nature and Wife's testimony confirms this. After filing for separation, Wife charged expenses related to her visits to the parties' other children, her counseling, dental work, gifts, all of her gas, fast food, table service restaurants, groceries, Starbucks, theaters, and a hotel that cost nearly \$600.00 for one night. R. p. 148, line 4-p. 159, line 23; pp. 297-386. Wife did not testify that she charged any of these items for Husband's benefit.

The trial court justified its use of the IHG trial date balance by finding that Wife's use of the IHG card for gas and medical expenses after the date of filing was similar to her use of the account during the marriage. R. p. 20. This analysis is not supported by law. Wife had the benefit of her social security income and the child's social security disability benefit and

Husband paid a portion of the balance each month pursuant to the parties' verbal agreement. It is improper for the court to include in equitable division debt that was incurred by Wife after the date of filing for her own, rather than marital, purposes. Wife fails to carry her burden of proving that the charges to IHG made after the date of filing were for a marital purpose. Therefore, this Court should reverse the family court's finding that the IHG debt should be valued at the date of trial.

### **III. THE VALUES ASSIGNED TO WIFE'S VEHICLE AND JEWELRY ARE NOT SUPPORTED BY THE GREATER WEIGHT OF THE EVIDENCE.**

In dividing marital property, the family court must identify both real and personal property and determine the fair market value of the identified property. *Craig v. Craig*, 358 S.C. 548, 557, 595 S.E.2d 837, 842 (Ct.App.2014) (citation omitted). The value assigned to personal property should be its fair market value. *Id.* A party's opinion of the value of certain personal property is sufficient to support a finding provided that the party is knowledgeable about the property, realistic in his opinion of the value and credible. *Nelson v. Nelson*, 428 S.C. 15, 170 and 177, 833 S.E.2d 432, 441 and 445 (Ct.App.2019). The family court has the authority to assign value to personal property that falls with the "range of values" testified to by the parties, but it is not appropriate for the court to assign an arbitrary value such as an average of the values in evidence. *Ferguson v. Ferguson*, 300 S.C. at 5, 386 S.E.2d at 269.

#### **a. The 2013 Toyota Landcruiser should be valued at \$6,800.00.**

Husband testified that the 2013 Toyota Landcruiser driven by Wife was worth \$6,800.00. R. p. 666. Wife believed that the vehicle was worth \$3,000.00, which she testified represented the Kelley Blue Book value minus the cost of allegedly necessary repairs. R. p. 92, line 2-p. 93, line 7. Wife admitted that the Kelley Blue Book value she used was from several weeks prior to trial, not from 2018 when the case was filed. R. p. 141, lines 5-12. While Wife maintained that

the repairs were major and necessary, she also admitted on cross-examination that she did not have the repairs done in the two years the case had been pending and she continued to drive the vehicle. R. p. 141, lines 13-20; p. 92, line 22-p. 93, line 7; p. 141, lines 13-20. Wife's testimony that the value of the vehicle is diminished because of needed repairs is not credible and, as such, the cost of repairs should not be deducted from the value of the vehicle. The evidence supports a value of \$6,800.00 for purposes of equitable division.

**b. Wife's jewelry should be valued at \$20,000.**

The family court assigned a value to Wife's jewelry of \$4,500.00 and allocated the jewelry to her in equitable division. R. p. 19; p. 32. Although neither party testified to this value, the court based its decision on the parties' testimony and the age of the jewelry. R. p. 19. Wife testified that the jewelry in the marital estate consisted of a necklace Husband gave her on their first Christmas and a ring from Husband's father's estate. R. p. 97, line 14-p. 98, line 12. In Wife's opinion, these two pieces were worth \$1,000.00 and her opinion of value appeared to be influenced by the lack of marketability of the necklace. R. p. 98, lines 13-23. Wife offered no additional evidence supporting a value of \$1,000.00.

Husband testified that there were several pieces of jewelry in the marital estate worth a total of \$20,000.00. R. p. 666. Husband described in detail the necklace that he gave Wife in 1999. R. p. 187, line 21-p. 188, line 23. Husband paid nearly \$10,000.00 for the necklace and he produced a jewelry store receipt for \$4,734.50, which he testified was one-half of the purchase price. R. p. 188, line 7-p. 189, line 8; p. 679. On cross-examination, Husband reiterated his recollection that the jewelry store receipt reflected only half of the purchase price. R. p. 251, lines 7-19.

The parties acknowledged that, at one point during the marriage, there was a \$25,000.00 jewelry rider on their homeowners' insurance policy for replacement value of the necklace, the ring from Husband's father's estate and Wife's nonmarital engagement ring. R. p. 145, line 4-p. 146, line 14; p. 189, lines 10-25. Though Wife believed that the replacement value assigned to the engagement ring by the insurance company was \$20,000.00 because it contained diamonds, Husband testified that the stones in the engagement ring were cubic zirconium and he only paid approximately \$5,000.00 for the ring. R. p. 145, line 8-p. 146, line 14; p. 189, lines 18-25; p. 251, lines 7-12.

Husband is in the best position to know the type of stones in the engagement ring and the purchase price of the engagement ring because he bought it. If the \$5,000.00 purchase price of the engagement ring is deducted from the \$25,000.00 insurance replacement value for all of the jewelry, the value of the remaining jewelry is \$20,000.00.

There is no evidence in the record regarding a value of \$4,500.00 for Wife's jewelry and the court did not describe how it arrived at this value. The greater weight of the evidence presented at trial supports Husband's opinion that the jewelry in Wife's possession is worth \$20,000.00.

#### **IV. THE AMOUNT OF ALIMONY AWARDED TO WIFE WAS EXCESSIVE.**

The amount of alimony awarded to Wife exceeds what is reasonably supported by the evidence. The family court erred in its assessment of several of the statutory factors when it ordered Husband to pay Wife alimony of \$2,700.00 per month. Specifically, the court erred when it found that: 1) An \$80,000.00 annual income should be imputed to Husband; 2) Husband has the ability to pay alimony of \$2,700.00 per month; 3) Wife needs alimony of \$2,700.00 per month; and 4) The parties lived an upper middle-class lifestyle.

“In making an award of alimony...the court must consider and give weight in such proportion as it finds appropriate to” thirteen statutory factors described in S.C. Code Ann. §20-3-130(C) (2014). The factors particularly relevant to this case are Husband’s current and reasonably anticipated earnings, the current and reasonably anticipated expenses and needs of both spouses and the standard of living established during the marriage. S.C. Code Ann. §20-3-130(C)(6) (2014), S.C. Code Ann. §20-3-130(C)(7) (2014) and S.C. Code Ann. §20-3-130(C)(5) (2014).

**a. The evidence does not support imputing annual income of \$80,000 to Husband.**

The family court did not initially make a specific finding imputing income to Husband, but found that Husband’s average annual income “in the several years prior to 2018 was over \$86,000.00.” R. pp. 22-25; pp. 10-11. On reconsideration, the family court imputed “minimum income” to Husband of \$80,000.00 per year. R. pp. 33-34. Husband filed Financial Declarations indicating that he earned gross annual income of \$61,892.04 and he testified at trial that he earns gross income of approximately \$5,000.00 per month. R. p. 211, line 22-p. 212, line 2; pp. 742-745; pp. 746-750.

There is no formula for determining a spouse’s income for purposes of awarding alimony. Our appellate courts recognize that this is a “fact-intensive area of law” where a one-size-fits-all approach may prevent an equitable result. *Rimer v. Rimer*, 361 S.C. 521, 527, 605 S.E.2d 572, 576 (Ct.App.2004).

There are generally two circumstances where a family court is justified in imputing income to a spouse for purposes of awarding alimony. First, when a spouse intentionally under-reports earnings, typically from non-traditional or self-employment sources, the family court may impute income from unreported sources or in amounts commensurate with the benefits the

spouse receives from the source. *See Stoney v. Stoney*, 425 S.C. 47, 70-71, 819 S.E.2d 201, 214 (Ct.App.2018) (the court must take into account money paid by husband's company to him or on his behalf for his travel, his child's private school, his life insurance premiums, his residential and farm mortgage payments and money the company paid employees to perform work for husband outside of their company duties); *Grumbos v. Grumbos*, 393 S.C. 33, 43, 710 S.E.2d 76, 82 (Ct.App.2011) (in the absence of credible information about a spouse's income, the court is justified in imputing an amount of income equivalent to the household expenses the spouse historically paid).

Second, when a spouse has the ability to earn more income than he is actually earning, the court may impute income at a level appropriate for the person's work history, occupational qualifications, job opportunities and earning levels in the community. *Sanderson v. Sanderson*, 391 S.C. 249, 255-256, 705 S.E.2d 65, 68 (Ct.App.2010). Though a spouse's reason for being unemployed or underemployed is relevant to the analysis, a person's "failure to reach earning capacity, by itself, does not automatically equate to voluntary underemployment such that income must be imputed." *Crossland v. Crossland*, 408 S.C. 443, 454, 759 S.E.2d 419, 425 (2014) (citation omitted). In order to impute income to an underemployed spouse, the court has an obligation to address several factors described in the Regulations.

It was inappropriate for the court in this case to impute income to Husband for either reason.

**i. There was no evidence that Husband under-reported his income or exaggerated his expenses for the purpose of depriving Wife of support.**

There are generally two markers present in an under-reported income case. First, the spouse's self-reported income does not match objective evidence of earnings. In *Grumbos*, the objective evidence of husband's income did not match his testimony. *Grumbos v. Grumbos*, 393

S.C. at 39 and FN1, 710 S.E.2d at 79. Mr. Grumbos claimed that he earned \$10,000.00 in 2004 and that he worked forty hours per week at a rate of \$10.00 per hour. *Id.* The court concluded that husband's W-2 only supported income equivalent to a nineteen hour work week which was significantly less than the forty hour week husband testified he regularly worked. *Id.* The court also reviewed husband's K-1s from the same year and concluded that husband's distributions plus W-2 income was actually \$92,902.00, not \$10,000.00. *Id.* The Court of Appeals affirmed the trial court's temporary order imputing income of \$84,000.00 to husband and awarding wife \$2,500.00 per month in temporary alimony. *Id.* 393 S.C. at 41, 710 S.E.2d at 80.

In *Stoney*, husband testified multiple times at trial that he was "broke" and survived on only \$250.00 per week. *Stoney v. Stoney*, 425 S.C. at 71, 819 S.E.2d at 214. Husband's lifestyle told a much different story. The court pointed to multiple vaguely identified cash withdrawals husband took from his businesses totaling \$600,000.00 along with expenditures husband made for travel and other luxuries. *Id.* at 70-71.

The second marker in an under-reported income case is that the spouse concealing income benefits directly from an alternate source of money. For example, the husband in *Stoney* used cryptically identified cash withdrawals from his businesses to pay for his travel, his child's private school, his life insurance premiums, his condo and farm mortgages and he had employees perform personal work for him and paid them from his company. *Id.* at 70-71. In *Grumbos*, husband had a lengthy history of paying household expenses that were considerably more than the income he testified he earned. *Grumbos*, 393 S.C. at 43, 710 S.E.2d at 81.

In this case, Husband was candid about what his business paid for his own benefit and for Wife's benefit and Wife did not challenge Husband's testimony. Husband testified that he pays the parties' car insurance, the parties' health insurance, car maintenance, some gas, the parties'

cell phone, his car payment and his car taxes.<sup>10</sup> R. p. 227, line 10-p. 228, line 10. Husband charges some of these expenses to his business credit card which is paid off each month. R. p. 228, line 11-p. 229, line 25. Husband's Financial Declaration accurately reported that he did not pay a cell phone bill, car payment, automobile expenses or health insurance from his personal account. R. pp. 742-750. Wife's counsel did not question Husband about how much the business paid for these expenses. Husband testified that the business paid \$163.00 per month for Wife's Part B Medicare and prescription premium and \$408.00 per month for the family's car insurance. R. p. 200, line 23-p. 201, line 24; pp. 445-454. Husband's business bank statements show that his business paid \$68.00 for his cell phone and \$517.57 for his car payment. R. pp. 445-454. There is no evidence in the record of the amount Husband's business pays for his share of the automobile insurance, his car maintenance, his personal gas costs or his car taxes. If the Court determines that there is enough evidence in the record to impute income to Husband equal to the personal expenses his business pays, the Court must also consider these expenses in Husband's ability to pay alimony. In either case, the net effect of imputing income equal to the expenses paid from husband's business for his benefit for purposes of alimony is zero. In other words, imputing income to Husband for expenses he pays through the business also requires that these expenses, i.e. his car payment and car insurance, be added to his Financial Declaration.

Husband's ability to pay alimony remains unchanged.

Husband's tax records and bank records support his stated income. Husband's income as a percentage of his clinic's gross receipts remained consistent from 2017 through 2019.

---

<sup>10</sup> Husband was relieved of the responsibility for some of these expenses at the December 2019 temporary hearing.

Tax Year	Husband's Gross Income From Clinic	Clinic Gross Receipts	Husband's Income as % of Clinic's Gross Receipts	Record Citation
2017	\$ 93,600.00	\$547,837.00	17%	pp. 410-423
2018	\$ 70,300.00	\$591,661.00	12%	pp. 635-637
2019	\$ 57,038.00	\$502,015.00	12%	pp. 638-655

Although the clinic's gross receipts from January 2020 through May 2020 reflected several larger than normal deposits, Husband explained the anomaly. R. p. 222, line 7-p. 226, line 2. Husband testified that the \$53,657.50 deposit in April 2020 was from Palmetto GBA/Medicare and was a result of delayed insurance payment processing during the pandemic. R. pp. 255, line 21-p. 256, line 15; p. 457. One of Husband's business bank statements showed that the clinic received more than \$17,000.00 in April 2020 for stimulus and Small Business Administration assistance. R. p. 458. Despite the large deposits in the spring of 2020, Husband testified that his business had suffered due to the pandemic and he was no longer able to work as hard as he used to. R. p. 214, line 14-p. 215, line 4; p. 218, lines 3-8. Wife's counsel implied that Husband was holding money in his clinic account that he could be paying himself, but this is an unreasonable expectation given the business uncertainty caused by the pandemic at the time of trial and normal business cash flow concerns. In any event, the money held in the clinic's account in May 2020 was not significantly more than was typically held in the account for operations. R. pp. 445-628.

Husband testified that the nature of his business and clientele changed over the years and these changes impacted the salary he was able to pay himself. R. p. 174, line 10-p. 176, line 25. As Husband has aged, so has his clientele. R. p. 174, line 10-p. 175, line 11. An older clientele means that more of Husband's patients are covered by Medicare and Medicare reimburses providers such as Husband less than standard insurance carriers or self-pay patients. *Id.* Husband also testified that he is not the only provider in his practice responsible for generating gross

receipts. R. p. 175, lines 12-17. Finally, Husband explained that income he earns from giving lectures is nominal. R. p. 175, line 18-p. 176, line 25.

Wife's effort at trial to show that Husband benefitted from more income than he declared was unsuccessful. Husband described the nature and source of the non-income related deposits he made to his personal bank account in the five months leading up to trial. It was error for the trial court to consider these non-income related deposits when it imputed income to Husband. Wife introduced into evidence Husband's Citizens Bank personal checking account statements from December 6, 2019, through May 5, 2020. R. pp. 424-444. These statements show total deposits of \$71,393.56. *Id.* Of this total, \$23,500.00 was Husband's income from the clinic and \$5,732.00 was from tax refunds and covid-19 stimulus which leaves remaining deposits totaling \$42,161.56. *Id.* Husband testified that of the \$40,000.00 he took from the 2142 Stifel Account in approximately December 2019, he used \$30,000.00 for home repairs and court-ordered temporary attorney fees. R. p. 219, line 15-p. 220, line 1. He placed this money in a Wells Fargo account in order to keep it separate from his Citizens Bank checking account. R. p. 220, line 17-p. 221, line 6. The bank statements show that the deposits and checks for the home repairs and attorney fees then flowed through Husband's Citizens Bank personal checking account. R. pp. 424-444. Husband also borrowed \$20,000.00 from his brother and \$20,000.00 from his father's probate account and deposited these loan proceeds in \$10,000.00 increments into a Wells Fargo account, the statements for which were not in evidence. R. p. 220, line 17-p. 221, line 6. It was improper for the trial court to consider these isolated, non-income and nonrecurring deposits when determining Husband's ability to pay alimony to Wife. R. pp. 10-11; p. 24.

The evidence shows that Husband's reported income was accurate and that he was candid in his description of what his business pays or has paid for his and Wife's benefit. The court erred in imputing income to Husband.

**ii. The court imputed income to Husband despite there being no evidence that he was underemployed.**

“When actual income versus earning capacity is at issue, courts should closely examine a good-faith and reasonable explanation for the decreased income.” *Sanderson v. Sanderson*, 391 S.C. 249, 256, 705 S.E.2d 65, 68 (Ct.App.2010).

“[I]n determining child support or alimony obligations, the family court has the discretion to impute income to a party who is voluntarily unemployed or underemployed.” *Burgess v. Burgess*, 467 S.C. 98, 103, 753 S.E.2d 566, 569 (Ct.App.2014) (citation omitted). If the obligor spouse has the ability to earn more income than he is in fact earning, the court may impute income according to what he could earn by using his or her best efforts to gain employment equal to his capabilities, and an award of [support] based on such imputation may be a proper exercise of discretion even if it exhausts the obligor spouse's actual income. *Id.* “Whether termed voluntary underemployment, imputation of income, or the failure to reach earning potential, the case law is clear that when a payor spouse seeks to reduce support obligations based on his diminished income, a court should consider the payor spouse's earning capacity.” *Id.* (citation omitted). “The failure to reach earning capacity, by itself, does not automatically equate to voluntary underemployment such that income must be imputed.” *Id.* at 103-104, 753 S.E.2d at 569. “Although some of the precedents appear inconsistent, the common thread in cases when actual income versus earning capacity is at issue is that courts must closely examine the payor spouse's good faith and reasonable explanation for the decreased income.” *Id.* at 104, 753 S.E.2d at 569.

Courts use the analysis described in the South Carolina Child Support Guidelines to determine a litigant's earning capacity for purposes of alimony. *Sanderson v. Sanderson*, 391 S.C. 249, 255, 705 S.E.2d 65, 68 (Ct.App.2010). The Guidelines state, "[i]n order to impute income to a parent who is unemployed or underemployed, the court should determine the employment potential and probable earnings level of the parent based on that parent's recent work history, occupational qualifications, and prevailing job opportunities and earning levels in the community." S.C. Code Ann. Regs. 114-4720(A)(5)(B) (2012).

Husband has owned and operated his chiropractic practice since 1981 and his income varied greatly over the years. R. pp. 684-687. From 2008 through 2013, Husband earned more than \$100,000.00 per year despite suffering a serious accident in 2009. *Id.* Husband's income dipped below \$100,000.00 beginning in 2014 when he was approximately sixty years old. *Id.* It is notable that Husband was diagnosed with a heart condition in 2013. R. p. 170, line 8-24; p. 684-687. Husband testified that he would reach full retirement age in the first quarter of 2021 and his decision to retire would be based in some part on his health. R. p. 199, lines 10-21.

There is no evidence in the record that Husband was underemployed nor is there evidence that the decrease in Husband's income was a result of intentional or nefarious conduct. Husband's explanation for declining income several years before and after the parties' separation is plausible given Husband's age, health and the nature of his business.

The court did not make any of the findings necessary to determine that Husband was underemployed or that income should be imputed to Husband. The trial court should be reversed and Husband's stated income of \$5,157.67 per month (\$61,892.04 per year) should be used for purposes of determining the amount of Wife's alimony.

**b. Husband does not have the ability to pay alimony of \$2,700.00 per month.**

The family court has a duty to award alimony that is “fit, equitable and just.” *Allen v. Allen*, 347 S.C. 177, 183, 554 S.E.2d 421, 424 (Ct.App.2001). The family court order requires Husband to pay an extraordinarily high percentage of his monthly income to Wife. This is true whether the Court considers Husband’s stated income or the income imputed to him by the trial court.

Husband’s stated gross monthly income of \$5,157.67 per month results in \$4,421.67 net monthly income after federal and state income taxes are deducted. R. pp. 742-745. If the same rate of income tax is applied to the gross monthly income imputed to Husband, \$6,666.00, the resulting net monthly income is \$5,713.00. An alimony obligation of \$2,700.00 equals 61% of Husband’s stated net monthly income and 47.2% of Husband’s imputed net monthly income. An alimony obligation of \$2,700.00 equals 52% of Husband’s stated gross monthly income and 40.5% of Husband’s imputed gross monthly income.

Although determining a spouse’s ability to pay alimony is highly fact dependent, it is helpful to compare the award in this case to awards in other cases with relatively similar fact patterns.<sup>11</sup> The amount of alimony the trial court required Husband to pay far exceeds awards affirmed by our appellate courts.

In *Way v. Way*, the Court of Appeals affirmed an order requiring husband to pay wife alimony of \$500.00 per month which was approximately 15% of his income. *Way v. Way*, 398 S.C. 1, 11, 726 S.E.2d 215, 221 (Ct.App.2012). This case involved a no fault divorce after a thirty year marriage where wife earned a very modest income. The Court noted that the award

---

<sup>11</sup> All of the cases discussed here were decided prior to the effective date of the Tax Cuts and Jobs Act which made alimony awards after January 1, 2018, non-taxable to the recipient and non-deductible to the payor. Though not explicitly stated, it is appropriate to assume that the alimony awards in these cases were taxable to the recipient spouse and tax deductible for the payor spouse.

was equitable in part because both parties had similar monthly deficits after alimony was taken into account. *Way v. Way*, 398 S.C. at 12, 726 S.E.2d at 221.

In *Roof v. Steele*, the court ordered husband in a modification case to pay alimony equal to 21% of his income because former wife's health insurance premium increased substantially after husband lost the ability to cover her under his employer's plan.<sup>12</sup> *Roof v. Steele*, 413 S.C. 543, 547, 776 S.E.2d 392, 394 (Ct.App.2015). Former wife suffered from multiple sclerosis and her need for more financial support from husband was legitimate. *Id.* The Court noted that the parties had a long-term marriage, a comfortable lifestyle during the marriage and the divorce was not based on a fault ground. *Roof v. Steele*, 413 S.C. at 552, 776 S.E.2d at 397. The amount of alimony awarded nearly equaled the amount of wife's insurance premium. *Id.*

In *Sweeney v. Sweeney*, the Supreme Court affirmed an alimony award of \$5,000.00 per month which was equal to 14.7% of husband's income. In this case, the parties were married for twenty-eight years and wife ended her career to care for the parties' three children who were all emancipated by the time the parties divorced. *Sweeney v. Sweeney*, 426 S.C. 229, 231, 826 S.E.2d 299, 300 (2019).<sup>13</sup>

In *Mallett v. Mallett*, the Court of Appeals increased husband's alimony obligation from 12% of his monthly income to 17% of his gross income after holding that husband's \$441,191.00 annual income was sufficient to support both himself and wife until their teenaged son emancipated and wife could seek employment. The marriage lasted twenty-one years and wife, a college graduate, left the workforce to raise the parties' two children. *Mallett v. Mallett* 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996). The opinion does not mention a fault ground for divorce.

---

<sup>12</sup> Husband's monthly income had increased to \$7,388 at the time of trial and he had inherited more than \$300,000.00 since the divorce. *Roof v. Steele*, 413 S.C. at 547, 776 S.E.2d at 394-395.

<sup>13</sup> See also *Sweeney v. Sweeney*, 420 S.C. 69, 800 S.E.2d 148 (Ct.App. 2017).

Husband's alimony obligation of \$6,300.00 per month was the highest monthly alimony award in a reported opinion until 1998. *McElveen v. McElveen*, 332 S.C. 583, 600, 506 S.E.2d 1, 9 (Ct.App.1998).

In *McElveen v. McElveen*, the Court of Appeals reduced husband's alimony obligation from 26.4% of his income to 18% of his income. *McElveen v. McElveen*, 332 S.C. 583, 599, 506 S.E.2d 1, 9 (Ct.App.1998). In this case, husband was a successful physician, the parties had been married for fifteen years, wife left a career as a nurse to stay home with the parties' child and husband committed adultery. *McElveen v. McElveen*, 332 S.C. at 589, 506 S.E.2d at 3.

In *Rimer v. Rimer*, the Court of Appeals affirmed what appears to be the highest alimony award in terms of percentage in the context of facts nominally similar to the facts in this case. *Rimer v. Rimer*, 361 S.C. 521, 605 S.E.2d 572 (Ct.App.2004). The court's award in *Rimer*, which equaled nearly 37% of husband's income before bonuses, is still less than that which the judge in this case required Husband to pay Wife. *Rimer v. Rimer*, 361 S.C. at 523, 605 S.E.2d at 573.

When the alimony award in this case is placed side-by-side with awards in cases with relatively similar facts, it is apparent that the family court failed to award alimony in an amount that was "fit, equitable and just."

In addition to the inequity of the family court's alimony award compared to similar cases, it is clear that the court inaccurately evaluated the facts relevant to husband's ability to pay alimony. The trial court found that Husband will soon be relieved of his responsibility to pay approximately \$3,200.00 in housing expenses. R. p. 24. This finding does not take into account the fact that Husband will continue to have housing expenses going forward. Prior to paying any support to Wife, Husband's expenses exceed his income by more than \$1,200.00. If, as the court

estimates, Husband is able to find suitable housing for approximately \$1,500.00 per month, he will only have approximately \$200.00 per month remaining for the payment of the child's uncovered medical expenses, his own discretionary expenses, savings and unanticipated expenses.

The court also erred in giving any weight to Husband's nonmarital retirement assets when it determined the amount of alimony to award Wife. R. p. 24. Husband's nonmarital Stifel Accounts are not in pay status and they do not generate any income for Husband. The court accurately noted that, at the time of trial, Husband had no clear plans to retire. R. p. 11. The value of Husband's nonmarital retirement assets that do not currently generate income, therefore, should have no bearing on the amount of the alimony award.

Though the trial court accurately noted that Husband's alimony payments are not tax deductible, the court failed to give appropriate weight to the tax consequences of Husband's alimony obligation. R. p. 25. The trial court should have considered that earnings Husband will use to pay spousal support to Wife are taxed at a significantly higher rate than if they were taxable to Wife and deductible to Husband. The court should have taken into consideration the impact of a nondeductible alimony obligation on Husband's disposable income.

**c. Wife does not need alimony of \$2,700.00 per month.**

The trial court failed to adequately examine Wife's claimed expenses.

Although Wife claimed on her Financial Declaration that she paid monthly rent of \$1,600.00 to her mother, she testified that she occasionally buys groceries in lieu of paying the full amount of rent. R. p. 161, line 18-p. 162, line 4. Wife claims that she spends \$550.00 for automobile insurance, taxes, gas and maintenance despite the fact that she does not work outside the home and she drives a seventeen year old vehicle. R. pp. 736-741. Of the \$550.00 Wife

claims she spends on items in this category, Wife pays \$133.00 for car insurance which means she spends \$417.00 per month on property taxes, gas and maintenance. R. p. 162, line 5-p. 163, line 19. \$417.00 per month is extraordinarily high under the circumstances of this case. Wife claims to spend \$60.00 per month on maintenance for a house that she rents. R. pp. 736-741.

Although Husband does not concede that Wife's \$2,813 per month budget for housing, food, cell phone, additional insurance and automobile expenses is accurate or reasonable, assume *arguendo* they are. Wife's stated expenses are still higher than the record supports.

The amount Wife claims to spend for medical and dental expenses not covered by insurance should be reduced from \$250.00 to \$100.00 to reflect the evidence in the record of Wife's payment of approximately \$1,200.00 in uncovered dental expenses during the pendency of the case. R. p. 737; pp. 367-368; p. 155, line 1-p.156, line 2. Wife should not have any uncovered medical expenses for the parties' child because Husband agreed to pay for the child's ongoing medical, dental and therapy expenses. R. p. 4.

Wife claims to spend \$75.00 on prescriptions, glasses and contacts, but the record does not support this claim. Wife has prescription drug coverage in addition to Medicare and supplemental insurance coverage which should eliminate her out of pocket prescription expenses.

Wife claims to spend \$200.00 per month for her twenty-two year old daughter's incidental expenses which are defined on form SCCA430 as the child's "allowance, summer camp, baby sitters, lessons, activities, participatory sports and related items" none of which Wife testified to at trial. R. p. 737. There is no evidence in the record that the parties' twenty-two year old child requires a babysitter, takes lessons or participates in camp or sports. Therefore, Line Item 21 on Wife's Financial Declaration should reflect \$0 instead of \$200.00.

Wife claims to spend \$400.00 per month on entertainment which is defined as “movies, theatre, vacations, sporting events, compact discs, digital video discs and related items.” R. p. 737. The record reflects that Wife’s entertainment consisted of hotels and eating out in Charleston and visiting her adult children in Mt. Pleasant and North Carolina. R. p.152, line 24-p.154, line 25; p. 164, line 1-p. 165, line 6; p. 101, line 23-p. 102, line 9. Since Wife states that she spends \$1,050.00 for food and automobile expenses including gas it is reasonable to conclude that she does not also spend an additional \$400.00 each month on travel and entertainment. There is no evidence in the record that Wife spends a significant amount of money to travel or attend movies and shows. Therefore, Line Item 23 on Wife’s Financial Declaration should be reduced to \$50.00 which is reasonable given the testimony and credit card statements in the record.

Wife claims to spend \$400.00 per month on her incidental expenses which include “cosmetics, hair and nail care, books, magazines, newspapers, business dues, memberships, pets, charity, religious dues or tithes, gifts, bank charges, hobbies and related items.” R. p. 736; p. 741. There is no evidence in the record that Wife actually spends money on these items. The only evidence in the record is that the parties were members of the YMCA which cost \$75.00 per month. R. p. 118, line 5-9. Therefore, Line Item 24 on Wife’s Financial Declaration should be reduced to \$75.00.

Finally, Wife claims to pay \$943.00 per month servicing the Capital One credit card debt and \$500.00 servicing the IHG credit card debt for a total of \$1,443.00 per month. R. pp. 737-738. Neither party serviced the Capital One credit card debt during the pendency of the action. R. pp. 20-21. Husband, not Wife, was required to pay \$500.00 towards Wife’s IHG credit card and Wife paid nothing. R. pp. 35-40; pp. 297-386. Husband has not appealed the trial court’s

order that the credit cards should be paid in full at the conclusion of this case. No matter the outcome of this appeal, these consumer debts will be satisfied in full, whether with proceeds from each party's share of the home sale proceeds or from other assets. Therefore, Line Items 25-26 should be reduced to \$0 which accurately reflects Wife's financial circumstances at trial and once the former marital home sells.

In summary, the record supports a reduction in Line Items 13-26 of Wife's Financial Declaration from \$3,028.00 to \$485.00. Wife's total net income of \$1,236.00 expenses minus total expenses of \$3,298.00 results in need of \$2,062. Given all of the circumstances in this case it is not reasonable to require Husband to pay for all of Wife's monthly shortfall and Wife should bear some responsibility for reducing her spending.

**d. The parties' standard of living during the marriage was not "upper middle-class."**

During the parties' marriage, Husband provided all of the family's financial support. Though his earnings permitted the parties to acquire a home and adopt and raise four children, the parties did not save money during their nearly twenty year marriage which is clear from the parties' meager net worth and small marital estate. The parties' relatively low net worth is indicative of the sacrifices the parties made during the marriage in order to have resources to support a large family. The parties' financial declarations reflected substantial debt on both credit cards and a home equity line of credit with a balance of over \$132,000.00. When considered as a whole, the marital estate does not reflect a high standard of living.

The trial court mentioned that the parties enjoyed vacations during the marriage, but the record reflects that some of these were funded from Husband's personal injury settlement, a one-time financial windfall. R. p. 23; p. 85, line 11-p. 86, line 12; p. 138, line 12-p. 139, line 19. As such, this fact should not have been given any weight.

## V. THE COURT ERRED IN AWARDING FEES TO WIFE.

“In determining whether an attorney’s fee should be awarded, the following factors should be considered: (1) the party’s ability to pay his/her own attorney’s fee; (2) beneficial results obtained by the attorney; (3) the parties’ respective financial conditions; (4) effect of the attorney’s fee on each party’s standard of living.” *E.D.M. v. T.A.M.*, 307 S.C. 471, 467-77, 415 S.E.2d 812, 816 (1992). Upon determining that a party is entitled to fees, the court then determines the amount of fees to award using the *Glasscock* factors. *Couch v. Couch*, 431 S.C. 170, 847 S.E.2d 260 (Ct.App.2020). “[T]he court uses the following factors to assess the amount of reasonable fees: ‘(1) the nature, extent, and the difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services.’” *Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). A litigant’s behavior during the case can also be considered by the court if the behavior complicates the case and increases the complexity of the issues. *Couch v. Couch*, 431 S.C. at 182, 847 S.E.2d at 266. If the Court modifies or reverses the family court, the fees assessed to Husband should be reversed. *Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993) (reversing and remanding issue of attorney fees for reconsideration when the substantive results achieved by trial counsel were reversed on appeal.).

One of the factors the trial court must consider when determining whether a party is entitled to attorney fees is the spouse’s ability to pay his or her own fees. In considering this first factor of one’s entitlement to fees, the court should consider the assets the party is receiving in equitable division. *Cannon v. Cannon*, 321 S.C. 44, 54, 467 S.E.2d 132, 138 (Ct.App.1996). Although the trial court referenced that Wife was entitled to receive money through equitable division, the court did not give enough weight to this factor in determining Wife’s entitlement to

fees. The trial court also did not consider the fact that Wife's share of equitable division was coming to her in the form of non-taxable cash rather than illiquid assets or assets subject to tax upon liquidation. The beneficial results factor "merely aids in determining whether an award is appropriate when considering whether the services of a lawyer facilitated a favorable result." *Glasscock v. Glasscock*, 304 S.C. at 161, 403 S.E.2d at 315 (1991). "If a party is not the primary prevailing party or prevails only partially, the factor of beneficial results accomplished will weigh in favor of reducing the fee, since the time and labor devoted to the issues he lost should not, in equity, be charged against the opposing party who prevailed on those issues." *Prevatte v. Asbury Arms*, 302 S.C. 413, 417, 396 S.E.2d 642, 644 (Ct.App.1990).

Two of the disputed issues at trial were the character of Husband's Stifel Accounts and the amount of alimony to which Wife was entitled. Husband conceded that Wife was entitled to alimony, albeit reluctantly. R. p. 209, lines 2-19. In justifying the fee award to Wife, the trial court gave too much weight to the alimony outcome and not enough weight to the Stifel Account issue. At trial, Husband abandoned any formal objection to Wife's entitlement to alimony that he may have presented in the pleadings and he testified that he knew Wife was entitled to receive alimony. On reconsideration, the trial court awarded Wife \$1,200.00 in fees despite the fact that the motion was justified and resulted in a necessary clarification to the Final Divorce Decree.

Among the factors used to determine the amount of a fee award is whether the issues litigated are novel, complex and whether one party's poor behavior during litigation caused the other party to incur attorney fees. *Couch v. Couch*, 431 S.C. 170, 847 S.E.2d 260 (Ct.App.2020). In this case, there were no novel or particularly complex issues of law. Neither party behaved poorly in litigation by filing frivolous motions, raising issues unsupported by the law or obstructing the discovery process. There was only one hearing in the case which occurred more

than one and a half years after the case was filed and Wife received an advance on equitable division to pay fees incurred through the temporary hearing. Both parties participated in mediation in good faith. This is not the type of case where the court is justified in awarding Wife one hundred percent of the fees she requested.

### **CONCLUSION**

The family court lacked jurisdiction to award Wife any interest in Husband's nonmarital retirement accounts. This Court should exercise its broad authority and reverse the family court's award of \$40,000.00 to Wife from Husband's nonmarital retirement accounts.

It is also appropriate and necessary for this Court to modify the family court's division of the marital estate to reflect the proper values for assets and debt. When the marital home is sold Husband is entitled to receive credit in the amount of \$45,243.19 reflecting the mortgage principal he paid during the pendency of the action.

This Court should also modify the dates on which the 2142 Stifel account and the IHG credit card were valued along with the values assigned to wife's vehicle and jewelry and divide the marital estate according to the attached Equitable Division Addendum.

The facts of this case support an alimony award that does not exceed \$1,500.00 per month. The family court's award of \$2,700.00 per month far exceeds that which Husband can pay or that Wife needs.

Finally, this Court should reverse the family court's award of \$11,200.00 in fees to Wife and require each party to be responsible for his or her own fees.



---

Rebecca West  
HARLING & WEST, LLC  
Attorney for Appellant  
203 West Main Street, Suite B  
Post Office Box 2485  
Lexington, South Carolina 29071  
(t) (803) 957-0889  
rwest@harlingandwest.com

The undersigned certifies that this submission complies with Rule 267, S.C.A.C.R.



---

Rebecca West, Attorney for Appellant

**EQUITABLE DIVISION ADDENDUM**

Proposed Distribution

ITEM #	DESCRIPTION	TITLE	VALUE	DEBT	OTHER ADJUSTS	NET EQUITY	VALUE DATE	NOTES / SOURCE OF FUNDS	HUSBAND	WIFE
<b>1</b>	<b>CASH AND MONEY IN BANK ACCOUNTS</b>									
a	Citizens Bank Checking	H	\$ 850.00			\$ 850.00			\$ 850.00	
b	Citizens Bank Checking	W	\$ 850.00			\$ 850.00				\$ 850.00
						\$ -				
<b>2</b>	<b>VALUE OF RETIREMENT AND INVESTMENT ACCOUNTS</b>									
a	Stifel Nicolaus Account (2142)	H	\$ 65,245.00		\$ 5,000.00	\$ 70,245.00		Adjustment for temporary fees converted to advance on equitable division at merits hearing.	\$ 35,122.50	\$ 35,122.50
						\$ -				
<b>3</b>	<b>VALUE OF PERSONAL PROPERTY</b>									
a	2003 Toyota Landcruiser	W	\$ 6,800.00			\$ 6,800.00				\$ 6,800.00
b	2016 Toyota Tacoma	H	\$ 22,000.00	\$ (12,000.00)		\$ 10,000.00			\$ 10,000.00	
c	Tab X LLC Box Truck	H	\$ 8,000.00	\$ -		\$ 8,000.00			\$ 8,000.00	
d	Contents of Marital Home and Guns		\$ 20,000.00			\$ 20,000.00			\$15,000.00	\$5,000.00
e	Jewelry	W	\$ 20,000.00			\$ 20,000.00				\$ 20,000.00
<b>4</b>	<b>LIABILITIES</b>									
a	IHG Credit Card	W		\$ -		\$ -				\$ -
b	Capital One Visa	W		\$ (23,400.00)		\$ (23,400.00)			(\$11,700.00)	(\$11,700.00)
	<b>TOTALS</b>		<b>\$ 143,745.00</b>	<b>\$ (35,400.00)</b>	<b>\$ 5,000.00</b>	<b>\$ 113,345.00</b>			<b>\$57,272.50</b>	<b>\$56,072.50</b>
									50.53%	49.47%
								Shortfull to 50/50 Division	(\$600.00)	\$600.00